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No. 9-75

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CANADIAN HIDROGAS RESOURCES, LTD., a Canadian corporation; HIDROGAS LTD., a Canadian corporation; HIDROGAS INC., a Montana corporation; and DANFORD E.E. BODRUG and NATIONAL TRUST COMPANY, LTD., the executors of the Estate of EVAN W.G. BODRUG,
Petitioners,

vs.

MGPC, INC., a Wyoming corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether TECA can remand and direct the District Court to ascertain the maximum lawful price by interpreting federal pricing regulations, when the trial court has adjudged this issue "impossible" to determine because plaintiff failed to sustain its burden of proof?

2. Whether TECA can direct the trial court if in the event it cannot determine maximum lawful selling price under the controlling federal regulations, then to determine a "reasonable price", thereby ignoring the regulations and the federal regulatory scheme embodied in the Emergency Petroleum Allocation Act of 1973.

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Petitioners,

VS.

MGPC, INC., a Wyoming corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioners, Canadian Hidrogas Resources, Ltd.; Hidrogas, Ltd.; Hidrogas Inc.; Danford E.E. Bodrug and National Trust Company, Ltd., executors of the Estate of Evan W.G. Bodrug ("Hidrogas"), prays that a writ of certiorari issue to review that certain order of the Temporary Emergency Court of Appeals of the United States, made and filed on June 29, 1983, upon an appeal from a judgment of the United States District Court for the Central District of California, dated February 14, 1983, remanding said judgment of the United States District Court for further consideration and decision.

OPINIONS AND ORDERS BELOW

A copy of the judgment of the United States District Court for the Central District of California, entered February 14, 1983, appears at Appendix A. A copy of the opinion of the Temporary Emergency Court of Appeals of the United States appears at Appendix B. A copy of the application and order of this Court allowing defendants to file this writ on or before September 12, 1983, appears at Appendix C.

JURISDICTIONAL STATEMENT

Jurisdiction of this matter in the District Court below is founded upon Section 210 and 211(a) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note Section 210 and 211, incorporated by reference in the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. 754. The appellate jurisdiction of the Temporary Emergency Court of Appeals ("TECA") over cases and controversies arising under the ESA and EPAA is founded upon Section 211(b)(1), (b)(2), and (c) of the ESA and 28 U.S.C. 1292(b).

The jurisdiction of this Court to hear this Petition for Writ of Certiorari is founded upon Section 211(G) of the ESA and Rule 32, Temporary Emergency Court of Appeal Rules, 28 U.S.C. General Rules of the Temporary Emergency Court of Appeals of the United States. The judgment of TECA was entered on June 29, 1983. Petitioner applied for and was granted relief by this Court in an order dated July 27, 1983, which order allowed petitioner to file said petition on or before September 12, 1983. This

petition is, therefore, timely filed. For the convenience of this Court, Rule 32 is set forth at length herein:

"Rule 32. Writ of Certiorari

Section 211(G) of the Economic Stabilization Act, as amended, provides 'Within 30 days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for writ of certiorari may be filed in the Supreme Court of the United States."

STATEMENT OF THE CASE

By the action filed in the District Court in and for the Central District of California, plaintiff, MGPC, Inc. ("MGPC, Inc." formerly McCulloch Gas Processing Corporation) sought to recover from the defendants $897,163.28 in money damages, plus prejudgment interest and costs of suit from four defendants. The four defendants were Canadian Hidrogas Resources, Ltd. (a Canadian corporation); Hidrogas, Ltd. (a Canadian corporation); Hidrogas, Inc. (a Montana corporation); Danford E.E. Bodrug and National Trust Company, Ltd., executors of the Estate of Evan W.G. Bodrug. The action sounded in causes of action for breach of contract and for collection of a debt for defendant's alleged failure to pay for propane products delivered to them by plaintiff between April 1974 and March of 1975. The original four defendants were all named and linked to the action by an alter ego theory by plaintiff.

Before March 31, 1974, plaintiff had supplied Hidrogas, Ltd. and Hidrogas, Inc. (collectively referred to as the defendants) with propane products from plaintiffs Oedekoven, Gillette-Kitty, Richland, Fairview and Tule Creek

gas processing plants. All deliveries were made pursuant to written contracts which called for prices from 6.25 to 8.3 cents per gallon. These contracts terminated by their own terms on March 31, 1974. Subsequently, the defendants were invited to, and did, bid on the propane products for the following year.

The defendants submitted bids for the product which stated their willingness to pay for the goods at the past contract price, plus such increases as authorized by the Federal Energy Office (FEO) who had taken control of the pricing structure for propane products in the interim period by virtue of the EPAA. Plaintiff rejected defendant's bid and so advised defendants.

Defendants complained to the FEO of having been cut off of its supply. Under the then existing regulations, suppliers had an obligation to continue to supply retailers based on a base period cut off date. Pursuant to the defendants' complaint, the FEO ordered plaintiff to continue to supply propane products to defendants. These orders to continue delivery of product were based on the Petroleum Allocation and Price Regulations, 10 C.F.R. Sec. 211.84.

The order to continue delivery did not set a price for the propane products although the regulations did mandate a maximum lawful selling price. Plaintiff and defendants then initiated a series of telexes which form the basis of the alleged contract price sued upon by plaintiff.

These telexes form a contract for purchase of product at the highest permissible price for said propane products based on the then current federal regulations. The parties continued to pay for propane products at a level equal to pre-federal regulation with the understanding that if the

plaintiff was allowed by the controlling agency a price increase, that defendants would pay same. Defendants did not expect that they would be paying a price much in excess of 8.5 cents per gallon which approximated the pre-regulation level of payments.

With certain minor instances of interim relief having been granted to plaintiff by the FEO and its successors, all of which were in fact paid by the defendants, the FEO (and its successors, the FEA and the Department of Energy (DOE)) have maintained in various administrative hearings, which continue to this day, that the plaintiff is not entitled to any of the relief sought from defendants in that they are not able to demonstrate that they are entitled to a higher price for their products delivered.

Therefore, the questions were presented to the District Court in the person of the Honorable Jesse Curtis for determination of the actual contract between the parties and the maximum permissible price plaintiff was allowed to recover from defendants.

This Court should also note that the issue of the District Court's jurisdiction over defendant, Canadian Hidrogas Resources, Ltd. and Evan W.G. Bodrug (later the Estate of Evan W.G. Bodrug) was also presented to the District Court. That Court found that it had no jurisdiction over the Estate of Evan W.G. Bodrug and its executors. This decision was not appealed to the Temporary Emergency Court of Appeals by plaintiff. The Court further found that it did have jurisdiction over Canadian Hidrogas Resources Ltd. on an alter ego theory. This decision was not appealed to the Temporary Emergency Court of Appeals by defendants.

PROCEEDINGS BELOW

One year following six days of trial, which included the submission of voluminous records to the District Court on the issue of maximum lawful selling price, the District Court issued its judgment on February 10, 1983. As stated that decision gave a judgment in favor of Evan W.G. Bodrug (and his estate and executors) and against plaintiff. That decision also granted relief in favor of plaintiff against Canadian Hidrogas Resources, Ltd.; Hidrogas, Inc.; and Hidrogas, Ltd. in the amount of $4,042.37.

The District Court, in its decision attached, found that plaintiff had failed to meet its burden of proof as to what its maximum lawful selling price was and had, therefore, failed to prove that there had been a breach of contract. Judge Curtis stated that it was impossible for him, considering the expert testimony presented, to determine whether there were sufficient facts to indicate a breach. Because of plaintiff's failure to sustain its burden of proof as to breach, a fundamental element of this contract action, it was unnecessary for the Court to determine maximum lawful selling price.

Plaintiff MGPC, Inc. appealed from that decision to the Temporary Emergency Court of Appeals.

The matter having been briefed and argued in the Temporary Emergency Court of Appeals, Judge Alfonso Zirpoli presiding, in San Francisco, California, a decision was rendered on June 29, 1983. That decision attached as Appendix B to this petition remanded the matter to the District Court. The remand ordered the District Court to calculate the maximum lawful selling price allowable to MGPC, Inc., a feat that the District Court had already stated was impossible on the state of the evidence presented, and

ordered, in the alternative, the District Court to fix a reasonable contract price, notwithstanding the fact that all parties have conceded for more than eight years that the price of the propane involved was regulated and controlled by federal statute and regulation.

REASONS FOR GRANTING THE WRIT

1. TECA's decision mandates that the trial court fix a price even though the evidence is balanced and the burden of proof has not been sustained

In its June 29, 1983 decision, the Temporary Emergency Court of Appeals of the United States directs the trial court to "first attempt to ascertain the price by interpreting the regulations." The court further states: "Since the trial court has not interpreted the regulations relevant to deciding the maximum lawful price, this case will be remanded. On remand, the trial court must first interpret the relevant terms and concepts used in subparts E and K of 10 C.P.R. section 212 and Ruling 1975-6, in addition to any other regulations or rulings the court finds applicable. This decision directs the trial court to do that which it carefully reasoned and determined (the case had been taken under submission and considered for one year) was impossible based on the facts of the case and the failure of plaintiff to sustain its burden of proof.

The Honorable Jesse W. Curtis, District Judge, stated in his opinion on page 13:

> "... The expert testimony evinced that many parts of the regulations were subject to multiple constructions and that experts could disagree about their proper application. Both experts presented tenable and gen-

erally reasonable constructions of the formulae and computations of the maximum lawful selling price.

After thoughtfully weighing testimony of MGPC's witnesses and documents and the testimony of Hidrogas' witnesses and documents, I am unable to conclude whether the facts creating a breach of contract do or do not exist. A rule of law relieves a court of the embarrassment which would condemn it to the solution of insoluble problems. The allocation of the burden of proof controls the decision when a court is placed in the dilemma of weighing facts when the evidence is not such that the court can decide one way or the other.

When the evidence presented at trial is such that the probabilities of truth and falsity are evenly balanced, and when it is just as probable that the contract has been breached as it is that the contract has not been breached, then the plaintiff has not proved that the facts on which his claim rests are more probably true than not true and therefore has not met the burden of proof, Patterson vs. San Francisco and S.M.E.R. Co., 147 Cal 128, P. 531 (1905), Wyatt vs. Pacific E. R. Co., 156 Cal 170, 103 P. 892 (1976)."

The lower court listened to days of testimony set forth by experts, consisting of a former government auditor in charge of interpreting the applicable regulations on behalf of defendants and the president of MGPC, Inc. (expert of the plaintiff), both of whom attempted to apply their data to the federal regulations and presumably considered volumes of evidentiary material presented. After considering all of the testimony presented at trial, for almost one year, the District Judge ruled that plaintiff had failed to convince the court of its maximum lawful selling price and therefore, had failed in its burden of proof to establish a breach of contract.

The trial court correctly determined that when the evidence is balanced and, therefor, it is impossible to rule in favor of one party or the other, the court must look to whether the parties have sustained their respective burdens of proof. The lower court reviewed state substantive law on the issue of burden of proof and in particular reviewed California Evidence Code Section 500 which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or non-existence of which is essential for the claim for relief or defense he is asserting." The comment by the Law Revision Committee on Evidence Code Section 500 states that the burden of proof means the obligation of a party to produce a particular state of conviction in the mind of the trier of fact as to the existence or non-existence of a fact. The comment further states that if this requisite degree of conviction is not achieved, the trier of fact must assume that the fact does not exist. Because the plaintiff failed to produce a conviction in the mind of the District Court that the maximum lawful selling price under the regulations was the amount prayed for, the Judge was unable to rule in plaintiff's favor. In fact, without this conviction it was impossible for the District Court Judge to rule in plaintiff's favor. TECA has now remanded the case and has directed the Judge to interpret the regulations and to determine the maximum lawful selling price. This is a directive which the District Judge clearly has stated he cannot determine based upon the evidence presented at trial.

Clearly, the burden of producing a proponderance of evidence upon the party who has the affirmative of the

issue, and remains upon him throughout the trial, *Montgomery v. The Board of Administration*, 34 Cal.App. 2nd 514, 93 P. 2nd 1046 (1939), rehearing denied. Thus, plaintiff, MGPC, had the burden of establishing, with the proponderance of the evidence, all the elements of contract and maintained that burden throughout the term of the trial. The District Court, in stating that the burden of proof had not been met, followed an established line of cases. Clearly, where the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not the adversary, *Fowler v. Fowler*, 227 Cal.App. 2nd 741, 39 Cal. Rptr. 101 (1964). The court in *People v. Dickerson*, 273 Cal.App. 2nd 645, 78 Cal.Rptr. 400 (1969), stated:

> "Rules allocating the burden of proof were specifically designed to aid the trier of fact who cannot decide which of two conflicting stories to believe. The Court's statement that it must believe one or the other simply is not correct. If the Court found itself unable to determine whether Officer Helven or Miss Jones were speaking the truth, it was perfectly free to draw the legal consequence from its inability, that is to say, that the prosecution had not carried its burden of proof." (273 Cal.App. 2nd at 651).

Where the facts presented are consistent with either of two opposing theories, neither is proven, and in such event judgment must be against the party upon whom the burden rests, *Wallar v. Southern Pacific Co.*, (U.S.D.C. 1941), 37 F. Supp. 475. The District Court concluded that there were several methods of considering data which could be used to calculate the maximum lawful selling price under the

promulgated regulations. The Court decided that it could not determine, as a matter of law, that the plaintiff had convinced the court that its method of calculation was more probably correct than that presented by defendant. TECA, however, in its decision has directed the lower court to decide a matter which it has specifically stated it cannot determine based on the facts and evidence presented. TECA has asked the Court to reach an impossible decision and has also contradicted an established line of cases which set forth the legal principal that when a court cannot make a decision, it should rely on the burden of proof argument to issue its ruling.

2. TECA's decision directs trial court to substitute a reasonable price when the sale of propane is subject to and governed by mandatory federal regulations

The Temporary Emergency Court of Appeals of the United States states in its June 29, 1983 decision, that on remand "if the court finds, however, that the agreed upon standard failed—i.e., that the federal pricing regulations cannot supply a price for propane during the time the contract was enforced—the court should determine a reasonable price." This opinion flies in the face of the Emergency Petroleum Allocation Act of 1973 and the Mandatory Petroleum Price Regulations propounded thereunder.

On August 19, 1973, The Federal Cost of Living Counsel ("COLC") promulgated the first set of several additions of pricing rules which subsequently have been found by courts to be applicable to the sale of natural gas liquid products, including propane, 38Fed. Reg. 22536 August 22, 1973. The Emergency Petroleum Allocation Act of 1973

("EPAA"), 15 U.S.C. Section 751, et seq., effective December 27, 1973, provided that within fifteen days thereafter, a price regulation would be promulgated for refined petroleum products, including propane. The FEO's authority was later transferred to the FEA by executive order number 11790, 39 Fed. Reg. 23185, June 27, 1974, (following passage by congress of the Federal Energy Administration Act of 1974.) The FEA proposed regulations which specifically written for gas processors in 1974 and such regulations were subsequently adopted. These regulations are set forth in the mandatory petroleum price regulations. Both the Emergency Petroleum Allocation Act of 1973 and the mandatory petroleum price regulations indicate a clear intent to federally legislate the sale of propane products. The regulations therefore were prepared in order to achieve the regulatory scheme and to provide some protection to the ultimate consumers for the price of propane and other energy related products. These regulations were the subject of very complicated rule making procedures and countless public comments. No challenge has been made in the District Court or to TECA over the constitutionality or the applicability of those regulations. All parties have conceded at all times that the subject products were and are subject to federal control.

TECA, in its decision, has directed the trial court to ignore these federal regulations if it cannot determine a maximum lawful selling price under the regulations and to resort to a common law analysis of reasonable price for the product delivered. This decision would require the District Court to ignore and violate an established legal precedent that if an area is federally regulated and controlled,

court decisions in this area should look to and follow the regulations.

Even assuming the area of propane products was not federally regulated, the case at hand is not one where a reasonable price can be resorted to. The TECA decision used and referred to California Commercial Code Section 2305 which deals with open price term. This section applies, however, only where nothing is set as to price or the price is left to be agreed by the parties and they fail to agree. Such is not the case before this Court. The lower court specifically found that there was a meeting of the minds that the parties called for the highest federal permissible price to certain billed maximums. This portion of the decision was not appealed. In *Bernina Distributors, Inc. v. Bernina Sewing Machine Co., Inc.* (United States Court of Appeals, 10th Circuit, April 6, 1981), 646 F2 434, the court analyzed Uniformed Commercial Code Section 2305(1) which deals also with open price term. The Court here held that the price is a reasonable price at the time for delivery if nothing is set as to price but the Court went on to add that in this case it could not agree that "nothing" was set as to pricing. The Court stated that the contract provisions were quite comprehensive concerning base prices and modifications pursuant to cost increases in invoice, duty, shipping, and insurance. Therefore, the Court held that the statutory provision was inapplicable to the case. In the case before this Court, as in the *Bernina* case, supra, reliance on a reasonable price determination is contrary to the mandate of the mandatory petroleum price regulations and is also contrary to substantive state law in the area.

3. This case presents this Court with the rare opportunity to review issues of first impression which are of significant and continuing importance in the administration of the nation's energy controls

TECA has been granted exclusive appellate jurisdiction over all cases arising under the ESA and the EPAA. Thus, TECA is not subject to judicial supervision except by this Court. This case is significant in that it deals with federal energy policy and regulations which directly affect the national economy and also in that presents two issues of first impression for this Court.

TECA has in effect directed a lower court to decide a matter that the lower court has carefully expressed it cannot decide on the facts and evidence presented. With its ruling, TECA has ignored a time honored burden of proof argument and forced a District Judge into an impossible position. The parties have conceded in their written and oral arguments to TECA, and TECA conceded, that there is no case involving considerations of failure of burden of proof involving the mandatory petroleum pricing regulations. No District Court has decided, and TECA has not before considered, the issue of what must take place if a federal district court is unable after careful consideration, to find in favor of a plaintiff or defendant on a matter of federally controlled fuel prices. Therefore, this Court should undertake to decide and give guidance to both the District Courts and TECA when the issue of impossibility arises.

In addition, TECA has directed that if the lower court, in this case, cannot interpret the federal regulations in this

area of energy and propane products in favor of one party or the other, then the court is to issue a decision based on reasonable price.

Petitioner would submit that this decision is also one of first impression with this Court and one which would appear to direct the lower court to ignore a federally controlled area in contravention of the acts and regulations under which jurisdiction of TECA is based.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the Temporary Emergency Court of Appeal decided June 29, 1983.

Respectfully submitted,

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Dated: July 26, 1983

(Appendices follow)

Appendix A

United States District Court
Central District of California

No. CV 75-576-JWC

MGPC, Inc., a Wyoming corporation,
Plaintiff,

v.

Canadian Hidrogas Resources Ltd.,
a Canadian corporation, et al.,
Defendants.

[Filed Feb. 15, 1983]

OPINION

This is an action for the collection of a debt and for breach of contract to purchase propane products between April 1974 and March 1975. The plaintiff MGPC, Inc. ("MGPC," formerly McCulloch Gas Processing Corporation), seeks to recover $897,163.28 in damages, plus prejudgment interest and costs of suit from four defendants: Canadian Hidrogas Resources, Ltd. ("CHRL"), Hidrogas, Inc. ("Inc."), Hidrogas, Ltd. ("Ltd."), and the executors of the Estate of Evan W. G. Bodrug (Danford Bodrug and the National Trust Company, Ltd.). Inc. and Ltd. are subsidiaries of CHRL, a Canadian corporation. CHRL, Inc. and Ltd. are referred to collectively herein as "Hidrogas."

I. BACKGROUND

MGPC supplied Ltd. with propane products during the period from April 1, 1973 to March 31, 1974, pursuant to written sales agreements. By the terms of those agree-

ments, MGPC agreed to sell the propane at prices ranging from 6.25 to 8.3 cents per gallon ("cpg"), depending on the month and the plant from which the gas was produced. The plants from which MGPC supplied propane to the defendants were the Oedekoven, Gillette-Kitty, Richland, Fairview, and Tule Creek processing plants. In February 1974, Ltd. was notified that the contracts would terminate effective March 31, 1974. MGPC annually terminated all their output contracts in this manner and solicited bids for the coming year's production. Hidrogas was among those solicited to bid for the 1974-75 production.

Ltd. submitted a bid, offering to pay the March 31, 1974 prices—7.9 cpg for propane from the Oedekoven plant and 8.3 cpg for propane from the Gillette plant—plus such increases as authorized by the Federal Energy Office (FEO). MGPC rejected Ltd.'s non-price-specific bid in favor of a bid by Wanda Petroleum; Wanda bid 17 and 18 cpg for Oedekoven and Gillette propane, respectively. MGPC informed the FEO of its intention to supply Wanda for the coming year.

Ltd. complained to the FEO of its being cut off from its supply. Under existing FEO regulations, retailers had a form of continuing entitlement to propane supplies. Pursuant to Ltd.'s complaint, the FEO ordered MGPC to resume supplying Ltd. with propane from the Gillette plant. After MGPC's appeal, alleging that Ltd.'s payments during the previous year had been consistently late, the FEO issued an order directing MGPC to sell its propane from both Gillette and Oedekoven to Ltd. The orders were based on the Petroleum Allocation and Price Regulations, 10

C.F.R. § 211.84, which required the continued delivery of certain base period volumes of propane.

The FEO order did not mandate a sale price, although the regulations did provide some guidance along those lines. After receipt of the orders from the FEO, MGPC initiated a series of telex messages which form the basis of the contract which is the subject of the instant litigation.

The first telex, dated April 25, 1974, was sent by MGPC to Ltd., asking Ltd. to submit a fixed price and terms which the Ltd. was willing to pay and abide by. Ltd.'s response, dated April 29, stated that Ltd. would be willing to pay "full competitive prices and terms consistent with the pricing guidelines authorized under FEO or other government regulators having jurisdiction." MGPC's response, dated the same day, evinced agreement with those general terms and stated that MGPC would commence delivery of propane on April 30, at 8:00 a.m. MGPC's telex summarized the parties' agreement, stating: "Price: F.O.B. Oedekoven and Kitty [Gillette] plants to be highest permissible by federal or other regulations. Payment due and payable upon receipt of invoice by Hidrogas, Ltd." The telex continued, stating that if the price controls terminated but the FEO allocation order remained, that Ltd. would pay a price equal to the highest bidder replying to the aforementioned solicitation for bids—this would have been the Wanda bid of 17 and 18 cpg. The MGPC telex also included terms providing that deliveries were deemed to be on a day-to-day basis, and that MGPC reserved the right to charge a higher price, where applicable.

Ltd. responded the next day, saying "terms and conditions outlined in your telex of April 25 acceptable. Please

advise by return prices acceptable to regulators." MGPC's reply obliquely answered Ltd.'s inquiry, stating:

> As outlined in your telex of April 29 and confirming our telephone conversation of April 30, 1974, at 1425, prices charged will be in accordance with paragraph 2 our telex ["highest permissible by federal or other regulations"]. You will have to gamble on the outcome of projected meetings with FEO in the same manner we are.

It is patently obvious from the communiqués that both parties agreed to enter into the propane sale contract calling for the payment of the highest permissible price. However, because that price was never stated at the time the contract was entered into, nor was it readily computable at that time, MGPC and Ltd. entered into the contract with wholly divergent concepts of what that contract price actually was. The evidence indicates that Ltd. expected to pay a price not too much higher than 8.3 cpg, and MGPC expected to collect around 17 or 18 cpg.

Deliveries under the contract began in May. On May 24, Ltd. received its first invoice from MGPC. The invoice computed the price at the rate of 17 and 18 cpg for propane from Oedekoven and Gillette, respectively. However, the amount declared "due" was computed at the rate of 8.25 cpg. The difference between the full price and the amount due was termed "balance due." The balance due bore a legend stating, "the balance will be payable upon receipt of an expected favorable ruling from the FEA on certain proceeding presently before the FEA." Invoices in this form were sent from May through October 1974. Thereafter, MGPC invoiced the entire monthly amount as payable immediately—no balance was deferred or made

provisional. Ltd. paid for propane from the Gillette plant at the rate of 8.25 cpg from April through October, at 8.75 cpg from November through December, and 15.7 cpg in January and February. Ltd. paid for propane from the Oedekoven plant at rates between 8.25 and 12.7158 cpg during 1974, and at 15.7 cpg thereafter. MGPC claims that its maximum lawful selling prices were at all times well above the invoiced price. MGPC never billed Ltd. the actual maximum computed by its president. The prices billed were prices which MGPC termed "competitive." This suit seeks to collect the difference between the full invoiced price and the amounts paid by Ltd. between April 1974 and March 1975.

This case was tried in April 1982. The bulk of the testimony concerned the method of computing the maximum lawful selling price under the myriad and changing federal regulations. Both sides put on expert witnesses who came to markedly different conclusions as to the maximum lawful price. MGPC's expert placed the maximum consistently higher than the invoiced amount. Hidrogas' expert set the maximum at less than the amounts actually paid by Ltd., thus arguably entitling Ltd. to a refund. In fact. Ltd. filed a counterclaim seeking recovery of its alleged overpayments.

II. JURISDICTION

As noted above, MGPC sued four defendants. The evidence described above appears to implicate only Ltd. While Ltd. and Inc. stipulated to jurisdiction, the other two defendants understandably raised the issue of whether jurisdiction over them was proper. CHRL and the Estate of

Evan Bodrug contend that this court has no jurisdiction over them and that a judgment, if any, should not reach them.

MGPC contends that jurisdiction can be found over CHRL on either a minimum contacts or an alter ego theory. The Ninth Circuit's jurisdictional minimum contacts test is set out in *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). As MGPC concedes that CHRL did not have substantial, continuous or systematic contacts with the forum state, CHRL's activities are admittedly not so pervasive as to subject it to general jurisdiction. Jurisdiction is still proper, under an alternative formula, if the defendant's contacts in the forum state are sufficiently related to cause of action. *Data Disc* prescribes a tripartite analysis for determining the nature and quality of those contacts. First, the court must determine if the defendant purposefully availed itself of the benefits and protections of the forum state. Second, the cause of action must arise out of or result from the forum activities. And finally, exercise of jurisdiction must be determined to be subjectively reasonable. *Data Disc, supra,* 557 F.2d at 1287.

CHRL's forum contacts constituted becoming licensed as a corporation authorized to do business in California and in entering into a lease for the operation of railroad tanker cars. The first part of the *Data Disc* test is met. In *Empire Steel Corp. v. Superior Court,* 56 Cal. 2d 823, 834, 366 P.2d 502, 17 Cal.Rptr. 150 (1961), the court held that a corporation invokes the benefits and protections of California's laws if as a matter of commercial necessity it has engaged in economic activity within the state. However, the nexus between claim and forum contact required by the second

part of the *Data Disc* test is not met by our facts. The claim is for breach of contract and for the collection of a debt. CHRL's forum activities were becoming licensed and its operation of railroad cars as part of its business of distributing propane. While both the plaintiff's claim and the defendants' forum contacts relate CHRL's propane retailing operations, that is not enough of a nexus. The cause of action must be an outgrowth of the activity relied upon to establish jurisdiction. *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974), *L.D. Reeder Contractors of Ariz. v. Higgins Industries*, 265 F.2d 796, 773 (9th Cir. 1959). In this case, the cause of action for breach of contract did not arise, by any reasonable interpretation, from the defendant's operation of the railroad tank cars or by its becoming licensed to do business in California.

However, jurisdiction is proper under an alter ego theory. *Kransco Mfg., Inc. v. Markwitz*, 656 F.2d 1376 (9th Cir. 1981), *Wells Fargo Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406 (9th Cir. 1977). Professor Moore summarizes the factors used to establish the presence of alter ego status in the jurisdictional context as follows:

> [W]hether the officers and directors of the two are the same; whether the subsidiary pays cash for products sold or services rendered to it by the parent; whether separate books and corporate records, bank accounts, tax returns, financial statements, and the like are kept; whether the parent corporation holds the subsidiary out as an agent, either expressly or impliedly as by representing it is doing business in, or has an office in the state, when only the subsidiary is present, [sic] the extent of control by the parent over the day-to-day operations of the subsidiary; and

> whether the two corporations conduct separate meetings and maintain separate minutes of meetings. Ordinarily, no single factor will control; the court must consider all relevant facts and circumstances to determine whether the subsidiary is maintained as a separate and distinct corporate entity.

2 J. Moore, Moore's Federal Practice ¶ 4.25[6] at 4-275-76 (2nd ed. 1982) (footnotes omitted), cited with approval in *Wells Fargo, supra,* 556 F.2d at 426.

In the instant case CHRL owned all the stock in its subsidiaries during the relevant period. The Board of Directors of the three corporations overlapped to a considerable extent, with Evan Bodrug chairing all three boards. The three corporations shared office space and some employees over certain periods of time. Testimony conflicted as to whether the salaries of these employees were paid from the accounts of the entity for whom services were rendered. Separate books, records and corporate minutes were scrupulously kept. The minutes show that Bodrug and Laurance Steer were the only attendees of Inc.'s and Ltd.'s corporate meetings, and that the other directors approved all actions taken in absentia. The financial records of the corporations show numerous intercorporate cash transactions and loans. The transactions are all well documented. While the fact of documentation indicates separateness, the content of those records is damning. The records show that the assets of the individual Hidrogas entities were treated as fungible; they were used freely to further the corporate interests of their Hidrogas counterparts. Finally, the use of the term "Hidrogas" in the name of each corporation created the inference that each was the agent of the other. They shared a common marketing image, akin to the use

of identical trademarks or tradenames. Letters to MGPC from Bodrug and other officers of Ltd. during the course of their contractual relationship were written on various corporate letterheads; there was no consistency nor was there any effort made to insist on maintaining a corporate separateness during these dealings.

The foregoing factors are relevant to the ultimate inquiry of whether Inc. and Ltd. were mere branches or divisions of CHRL. *Wells Fargo, supra,* 556 F.2d at 425. The evidence shows that CHRL had considerable control over the day-to-day management and operation of both Ltd. and Inc. The evidence taken as a whole supports the conclusion that Ltd. and Inc. were constituent elements of a larger corporate whole. On this basis, jurisdiction can be imposed over CHRL as an alter ego of the entities to which jurisdiction has been stipulated.

Jurisdiction cannot be properly imposed over the Estate of Evan Bodrug. There is no evidence that Bodrug's actions were other than in his capacity as a corporate officer and director. While Bodrug was a strong force in the operations of the Hidrogas defendants, this by itself is not enough to make him their alter ego sufficient for the exercise of jurisdiction.

III. BURDEN OF PROOF

MGPC brought this action for breach of contract. It is hornbook law that one who brings such an action must plead: (1) the contract; (2) plaintiff's performance of the contract or excuse for nonperformance; (3) defendant's breach; and (4) the resulting damage to the plaintiff. *Lortz v. Connell,* 273 Cal. App. 2d 286, 78 Cal. Rptr. 6 (1964). The

California Evidence Code provides that a party has the burden of proving, among other facts, whatever facts he is required affirmatively to plead to state a cause of action. Cal. Ev. Code § 500, Law Revision Committee Comment. Therefore, MGPC must bear the burden of proving the enumerated facts.

Because MGPC must plead and prove both a breach and damages, MGPC must therefore prove that the defendants failed to prove it.

The difficulty in this case arises from the fact that there was no fixed price stated in the contract. Instead, the contract contains a formula for fixing the contract price. MGPC and Hidrogas differ as to how to compute that price. Because of the confusion engendered by the ambiguous, multifarious and changing federal regulations, the party assessed the burden of proof has onerous responsibility.

MGPC argues that Hidrogas should bear the burden of proof. MGPC's position is that because Hidrogas is contending that the price charged was an illegal price, and because illegality is an affirmative defense—which must be specially pleaded and proved its proponent—Hidrogas should bear the burden. MGPC mischaracterizes Hidrogas' position. Hidrogas is not claiming illegality in its strictly legal sense. Illegality is a contract doctrine used to avoid the enforcement of contracts. Hidrogas is not seeking to avoid the enforcement of this contract, rather, it is claiming that the price charged by MGPC exceeded the contract price. It superficially appears that Hidrogas is claiming illegality because the contract price incorporates and tracks federal maximum price regulations. By claiming that the

price charged exceeded the contract price, Hidrogas seems to be claiming that the price exceeds the legal maximum. The burden of proof should not be inartfully shifted to Hidrogas merely because its charge that MGPC misapplied the contractual formula superficially resembles the affirmative defense of illegality. It is on this basis that the argument and cases cited by MGPC can be distinguished.

The burden of proof must be separately considered with respect to propane sold to Hidrogas from MGPC's Fairview plant. The propane from Fairview was supplied pursuant to a contract entirely distinct from the contract formed by the previously discussed exchange of telexes. During the period from September 15, 1973 through to September 14, 1974, Ltd. took propane from MGPC's Fairview plant pursuant to a sales agreement referencing a fixed price of 16.25 cpg. Ltd. was informed that the contract price would be raised to 18 cpg as of September 14, 1974, and Ltd. was invoiced at that rate. The price was later raised to 19.5 cpg. Ltd. objects to being held liable under the Fairview contract by raising the affirmative contractual defense of illegality. Reply Post Trial Brief, p.14. Consequently, the burden of proving the illegality of the 18 and 19.5 cpg prices must rest on Hidrogas. *Eaton v. Brock,* 124 Cal. App. 2d 10, 268 P.2d 58 (1954), *Grimes v. Nicholson,* 71 Cal. App.2d 538, 162 P.2d 934 (1945).

In this case both sides presented experts who sought to clarify the governing federal regulations and to justify the parties' respective computations of the maximum lawful price. Under the regulations, 10 C.F.R. § 212.83, Subparts E and K, the maximum allowable price was determined by reference to a complicated and changing formula which

allocated a propane producer's increased costs to the products they sold. Determining the maximum lawful price during the contract period requires an interpretation of a number of essential terms and concepts used in the regulations. The expert testimony evinced that many parts of the regulations were subject to multiple constructions and that experts could disagree about their proper application. Both experts presented tenable and generally reasonable constructions of the formulae and computations of the maximum lawful selling price.

After thoughtfully weighing the testimony of MGPC's witnesses and documents and the testimony of Hidrogas' witnesses and documents, I am unable to conclude whether the facts creating a breach of contract do or do not exist. A rule of law relieves a court of the embarrassment which would condemn it to the solution of insoluble problems. The allocation of the burden of proof controls the decision when a court is placed in the dilemma of weighing facts when the evidence is not such that the court can decide one way or the other.

When the probabilities of truth and falsity are evenly balanced, when it is just as probable that the contract has been breached as it is that the contract has not been breached, then the burden of proof has not been carried because the plaintiff has not proved that the facts on which his claim rests are more probably true than not true. *Patterson v. San Francisco & S.M.E.R. Co.*, 147 Cal. 128, P. 531 (1905), *Wyatt v. Pacific E.R. Co.*, 156 Cal. 170, 103 P. 892, 31 Cal. Jur. 3d, Evidence § 88 at p. 121 (1976).

MGPC's cause of action fails with respect to its claim for breach of contract by virtue of the non-payment of the

contract price for propane purchased from MGPC's propane processing plants other than the Fairview plant. However, because Hidrogas failed to carry its burden of proving that the price MGPC charged for propane from the Fairview plant was illegal, MGPC should recover such sums as are still due and owing it on that claim. The total damage to MGPC under the Fairview contract is the sum of the difference between the invoiced prices and amounts paid between September 15, 1974 and the last delivery in January 1975, or $4,042.37.

IV. INTEREST AND COSTS

As the total sum due to MGPC is liquidated, in light of considerations of fairness, this court is inclined to allow MGPC to recover prejudgment interest on that amount. *In re Consolidated Pretrial Proceedings in Air West*, 436 F. Supp. 1281, 1286 (N.D. Cal. 1972). *United States v. California State Board of Equalization*, 650 F.2d 1121, 1132 (9th Cir.), *aff'd*, 102 S. Ct. 1744 (1981). Prejudgment interest shall be computed at the rate of seven percent (7%) per annum, running from the date of demand, June 13, 1975, until the sum is fully paid. Cal. Civ. Code § 3287(a).

Each party shall bear its own costs of suit.

Dated: February 10, 1983.

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

Exhibit A

United States Court of Appeals
For the Ninth Circuit

No. 83-5711

D.C. # CV-75-576-JWC
Central California

MGPC, Incorporated, (McCulloch Gas Processing Corporation), a Wyoming corporation,
Plaintiff-Appellant,

vs.

Canadian Hidrogas Resources, Limited, a Canadian corporation, et al.,
Defendants-Appellees.

[Filed April 29, 1983]

ORDER

On April 28, 1983, a Prebriefing Conference was held by telephone before Conference Attorney Norman P. Vance. Appellant was represented by Richard T. Williams and Richard F. Ahern. There was no appearance for appellees.

(1) All proceedings in this appeal are stayed until October 31, 1983 or pending the decision of the Temporary Emergency Court of Appeals in *MGPC, Inc. v. Canadian Hidrogas Resources, Ltd.*, No. 9-75, whichever occurs first.

(2) Appellant shall contact the Conference Attorney upon expiration of the stay to schedule a further prebriefing conference, if necessary.

(3) This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/ NORMAN P. VANCE
Norman P. Vance
Conference Attorney

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No.: CV 75-576 JWC

MGPC, Inc.,
Plaintiff,

vs.

Canadian Hidrogas Resources, Ltd.,
et al.,
Defendants.

[Filed Feb. 14, 1983]

JUDGMENT

This Action having come on for trial before the Court, Honorable Jesse W. Curtis, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND ADJUDICATED that the Plaintiff MGPC, Inc. recover of the Defendants Canadian Hidrogas Resources Ltd., Hidrogas, Ltd., and Hidrogas, Inc. the sum of $4042.37, with interest thereon at the rate of seven percent (7%) per annum from June 13, 1975 as provided by law; and that each party bear its own costs of suit.

Dated at Los Angeles, California, this 14th day of February, 1983.

/s/ JESSE W. CURTIS
Jesse W. Curtis, District Judge

Appendix B

Temporary Emergency Court of Appeals
of the United States

No. 9-75

MGPC, Inc., a Wyoming corporation,
Plaintiff-Appellant,

v.

Canadian Hidrogas Resources, Ltd.
a Canadian corporation; Hidrogas Ltd.,
a Canadian corporation; Hidrogas, Inc.,
a Montana corporation; and The Estate of
Evan W.G. Bodrug, Defendants-Appellees.

Appeal from the United States District Court
For the Central District of California

(No. CV 75-576 JWC)

Argued: June 17, 1983 Decided: June 29, 1983

Richard T. Williams, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, California, with whom Richard F. Ahern of the same firm, and Howard J. Bressler and David L. Huard, Los Angeles, California, were on the brief for the Appellant.

A. Alan Berger, Berger & Miranda, San Jose, California, was on the brief for the Appellee.

Before Zirpoli, MacBride and Craig, Judges.

Per Curiam.

Plaintiff-appellant MGPC, Inc., a seller of propane, seeks to recover $879,163.28 in damages from defendants-appellees Canadian Hidrogas Resources, Ltd., Hidrogas, Inc., Hidrogas Ltd., and the executors of the estate of Evan W.G. Bodrug collectively referred to as "Hidrogas"). MGPC alleges that Hidrogas did not pay MGPC the contract price for propane that Hidrogas purchased from MGPC between April 1974 and March 1975. The district court denied MGPC recovery and MGPC appeals.

The contract between MGPC and Hidrogas is evinced by a series of telexes. Hidrogas said that it would be willing to pay "full competitive prices and terms consistent with the pricing guidelines authorized under FEO[1] or other government regulators having jurisdiction." MGPC's return telex summarized the agreement, stating: Price: F.O.B. Oedekoven and Kitty [Gillette] plants to be highest permissible by federal or other regulations." Hidrogas responded: "terms and conditions outlined in your telex of April 29 acceptable. Please advise by return prices acceptable to regulators." MGPC answered: "You will have to gamble on outcome of projected meetings with FEO in the same manner as we are."

MGPC began billing Hidrogas for the propane at 17 or 18 cents per gallon (cpg); 8.25 cpg was due immediately

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[1]Federal Energy Office. Subsequent to the passage of the Emergency Petroleum Allocation Act of 1973, the President established the FEO to promulgate regulations covering crude oil allocation. Executive Order No. 11,748, 38 Fed.Reg. 33,575 (1973). The FEO was superseded by the Federal Energy Administration (FEA) on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761-786 (Supp. V 1975) and section 5(a) of Executive Order 11,790, 39 Fed.Reg. 23, 185 (1974).

and the balance payable on receipt of a favorable ruling from the FEA.[2] Later, the entire amount was billed as due immediately. MGPC sued to collect the difference between the prices invoiced and the lesser amounts paid by Hidrogas from April 1974 to March 1975.

The issue litigated before the trial court was what price MGPC was permitted to charge Hidrogas under the applicable federal pricing regulations. Plaintiff and defendants produced experts who offered their interpretations in support of the parties' computations of the lawful price. The trial court, however, found it difficult to choose between the interpretations offered. The court explained:

> Under the regulations, 10 C.F.R. § 212.83, Subparts E and K, the maximum allowable price was determined by reference to a complicated and changing formula which allocated a propane producer's increased costs to the products they sold. Determining the maximum lawful price during the contract period requires an interpretation of a number of essential terms and concepts used in the regulations. The expert testimony evinced that many parts of the regulations were subject to multiple constructions and that experts could disagree about their proper application. Both experts presented tenable and generally reasonable constructions of the formulae and computations of the maximum lawful selling price.

MGPC, Inc. v. Canadian Hidrogas Resources, Ltd., No. CV 75-576-JWC, opinion at 12-13 (C.D.Cal., Feb. 16, 1983) (Record at Vol. 5, 001610-11).

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[2]Federal Energy Administration. On October 1, 1977, the Department of Energy assumed the duties of the FEA pursuant to the Department of Energy Organization Act, 42 U.S.C. § 7101, et. seq., and Executive Order No. 12,009, 42 Fed.Reg. 46,267 (1977).

Because the court could not decide between the interpretations advanced by the parties, it resorted to a burden of proof analysis. The court reasoned that MGPC carried the burden of proving the maximum lawful price during the contract period, because MGPC had the burden of proving that Hidrogas had breached the contract. Since MGPC did not succeed in convincing the trial court that its interpretation of the pricing regulations should prevail, the court found against MGPC.

MGPC argues that the district court should not have decided the case based upon which party had the burden of proof, because interpretation of the regulations in order to determine the maximum lawful price is a question of law, which the trial court had a duty to decide. We agree.

The Temporary Emergency Court of Appeals has jurisdiction over this appeal because the case arises under the Emergency Petroleum Allocation Act of 1973, as amended (EPAA). The case involves interpretation of the Mandatory Petroleum Price Regulations issued pursuant to the Act. *See* 12 U.S.C. § 1904 note (§ 211(b)(2)) (1980); 15 U.S.C. § 754(a)(1) (1976); *Citronelle Mobil, etc. v. Gulf Oil Corp.*, 591 F.2d 711, 715-16 (Temp.Emer.Ct.App.), *cert. denied*, 444 U.S. 879 (1979). The contract for the sale of propane fixed the price as the "highest permissible by federal or other regulations." To determine whether the prices charged Hidrogas were not above the maximum price MGPC could charge under the federal regulations, the trial court's first task was to interpret the regulations.

The trial court recognized that the case depended on interpretation of the regulations. It erred, however, in includ-

ing interpretation of the regulations in the parties' burden of proof. Such interpretation is a matter of law to be decided by the court. *See Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1066 (Temp.Emer.Ct.App. 1978); *U.S. v. 320.0 Acres of Land More or Less, etc.*, 605 F.2d 762, 818-819 (5th Cir. 1979). The trial court had a duty to decide which of the interpretations advanced by the parties was correct or to apply its own interpretation. The court was entitled to consider the arguments offered by the parties, but it could not treat the meaning of the regulations as a question of fact to be proven by them.

Since the trial court has not interpreted the regulations relevant to deciding the maximum lawful price, this case will be remanded. On remand, the trial court must first interpret the relevant terms and concepts used in Subparts E and K of 10 C.F.R. § 212 and Ruling 1975-6, in addition to any other regulations or rulings the court finds applicable. These regulations and rulings should be interpreted in order to determine how the following factors, and any others the court deems relevant, are to be used in fixing the maximum lawful price. The factors include: (1) First sale price; (2) Increased product costs; (3) Increased nonproduct costs; (4) Banked increased costs; (5) Exceptions relief. After interpreting the regulations, the trial court should apply the facts necessary to calculating the lawful price.[3]

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[3]If on remand the trial court encounters difficulty in supplying a formula for fixing the price, it might consider the wisdom of seeking an *amicus* brief from the Department of Energy. *See Dyke v. Gulf Oil Corp.*, 601 F.2d 557, 569 (Temp.Em.Ct.App. 1979) (suggesting *amicus curiae* appearance).

Although the trial court's opinion indicates that the federal pricing regulations are susceptible of interpretation, the court also described the regulations as "ambiguous, multifarious and changing." Opinion at 11 (Record at Vol. 5, 001609). This description suggests that the regulations may not supply a formula for fixing the price. In such cases, a reasonable price is to be substituted. See Cal.Com.Code § 2305 (West 1964);[1] *North Central Airlines v. Continental Oil Co.*, 574 F.2d 582, 592 (D.C.Cir. 1978) (when a price is fixed based on a standard set by an agency, and no standard is set, the court should substitute a reasonable price). On remand, the court should first attempt to ascertain the price by interpreting the regulations. If the court finds however, that the agreed upon standard failed—i.e., that the federal pricing regulations cannot supply a price for propane during the time the contract was in force—the court should determine a reasonable price.

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[1]Section 2305. Open Price Term. (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time of delivery if

(a) Nothing is said as to price; or

(b) The price is left to be agreed by the parties and they fail to agree; or

(c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Appendix C

No. 9-75

In the Supreme Court of the United States

October Term, 1983

MGPC, Inc., a Wyoming corporation,
Plaintiff-Appellant,

vs.

Canadian Hidrogas Resources, Ltd.,
a Canadian corporation; Hidrogas Ltd.,
a Canadian corporation; Hidrogas, Inc.,
a Montana corporation; and the Estate of
Evan W.G. Bodrug,
Defendants-Appellees.

On Appeal from the Temporary Emergency Court of Appeals of the United States

Motion to extend time to file petition for Certiorari

Berger & Miranda
A. Alan Berger
One Almaden Boulevard
Suite 1150
San Jose, CA 95113

In the Supreme Court of the United States

October Term, 1983

MGPC, Inc., a Wyoming corporation,
Plaintiff-Appellant,

vs.

Canadian Hidrogas Resources, Ltd.,
a Canadian corporation; Hidrogas Ltd.,
a Canadian corporation; Hidrogas, Inc.,
a Montana corporation; and the Estate of
Evan W.G. Bodrug,
Defendants-Appellees.

MOTION TO EXTEND TIME TO FILE PETITION FOR CERTIORARI

JURISDICTION

Petitioner appeals from the decision of the Temporary Emergency Court of Appeals of the United States. Petitioner will file a petition for certiorari in this matter which involves the determination of rights arising under the United States Constitution; and the following statutes: 5 U.S.C. 702, 12 U.S.C. 1904, and 15 U.S.C. 754.

EXISTENCE OF JURISDICTION BELOW

Petitioner appeals from the decision in the Temporary Emergency Court of Appeals of the United States, which decision remanded the case to the trial court.

JUDGMENT BELOW

A copy of the judgment of the Temporary Emergency Court of Appeals of the United States is appended to this motion as Exhibit "A" and is incorporated herein by reference.

WHY TIME SHOULD BE EXTENDED

Although the decision of the Temporary Emergency Court of Appeals of the United States was rendered June 29, 1983, such decision was not delivered to counsel's office until Saturday, July 9 and was not opened by counsel's secretary until Monday, July 11, 1983. Counsel for Petitioner, A. Alan Berger, was on vacation from July 11, 1983 through July 18 and thus did not read the decision until July 19.

Petitioner will file a petition for writ of certiorari on two issues, both of which Petitioner feels are issues of first impression. These issues involve interpretation and analysis of both the Economic Stabilization Act of 1970 and the Emergency Petroleum Allocation Act. Due to the complexity of the issues involved, it would be extremely difficult, if not impossible, to draft the petition and have it bound by July 29, 1983. Petitioner therefor requests an extension of forty five (45) days to file its petition for writ of certiorari.

Respectfully submitted,

/s/ A. ALAN BERGER

A. Alan Berger
Counsel for Petitioner

BERGER & MIRANDA
One Almaden Boulevard,
Suite 1150
San Jose, California 95113
Telephone: (408) 298-7500

Dated: July 25, 1983

AFFIDAVIT

The State of California
County of Santa Clara

BEFORE ME, the undersigned authority, on this date personally appeared, A. ALAN BERGER, who being by me duly sworn, on his oath states:

That the facts and things set out in the above foregoing motion pertaining to the date the decision of the Temporary Emergency Court of Appeals of the United States was delivered to our offices, the date the mail was opened, the dates I was on vacation, the date I first received the decision, and the complexity and importance of the issues presented, are true and correct.

/s/ A. Alan Berger
A. ALAN BERGER,
Attorney for Petitioner

SWORN TO AND SUBSCRIBED before me by the said /s/ A. Alan Berger on this 25th day of July, 1983, to certify which witness my hand and seal of office.

/s/ Stacey Irene Thompson
Notary Public in and for
Santa Clara County, California

[Seal]

Exhibit "A"

Temporary Emergency Court of Appeals
of the United States

No. 9-75

MGPC, Inc., a Wyoming corporation,
Plaintiff-Appellant,

vs.

Canadian Hidrogas Resources, Ltd.,
a Canadian corporation; Hidrogas Ltd.,
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Defendants-Appellees.

Appeal from the United States District Court
For the Central District of California

(No. CV 75-576 JWC)

Argued: June 17, 1983 Decided: June 29, 1983

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A. Alan Berger, Berger & Miranda, San Jose, California, was on the brief for the Appellee.

Before Zirpoli, MacBride and Craig, Judges.

Per Curiam.

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and the balance payable on receipt of a favorable ruling from the FEA.[2] Later, the entire amount was billed as due immediately. MGPC sued to collect the difference between the prices invoiced and the lesser amounts paid by Hidrogas from April 1974 to March 1975.

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> Under the regulations, 10 C.F.R. § 212.83, Subparts E and K, the maximum allowable price was determined by reference to a complicated and changing formula which allocated a propane producer's increased costs to the products they sold. Determining the maximum lawful price during the contract period requires an interpretation of a number of essential terms and concepts used in the regulations. The expert testimony evinced that many parts of the regulations were subject to multiple constructions and that experts could disagree about their proper application. Both experts presented tenable and generally reasonable constructions of the formulae and computations of the maximum lawful selling price.

MGPC, Inc. v. Canadian Hidrogas Resources Ltd., No. CV 75-576-JWC, opinion at 12-13 (C.D.Cal., Feb. 16, 1983) (Record at Vol. 5, 001610-11).

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[2]Federal Energy Administration. On October 1, 1977, the Department of Energy assumed the duties of the FEA pursuant to the Department of Energy Organization Act, 42 U.S.C. § 7101, et. seq., and Executive Order No. 12,009, 42 Fed.Reg. 46,267 (1977).

Because the court could not decide between the interpretations advanced by the parties, it resorted to a burden of proof analysis. The court reasoned that MGPC carried the burden of proving the maximum lawful price during the contract period, because MGPC had the burden of proving that Hidrogas breached the contract. Since MGPC did not succeed in convincing the trial court that its interpretation of the pricing regulations should prevail, the court found against MGPC.

MGPC argues that the district court should not have decided the case based upon which party had the burden of proof, because interpretation of the regulations in order to determine the maximum lawful price is a question of law, which the trial court had a duty to decide. We agree.

The Temporary Emergency Court of Appeals has jurisdiction over this appeal because the case arises under the Emergency Petroleum Allocation Act of 1973, as amended (EPAA). The case involves interpretation of the Mandatory Petroleum Price Regulations issued pursuant to the Act. *See* 12 U.S.C. § 1904 note (§ 211(b)(2)) (1980); 15 U.S.C. § 754(a)(1) (1976); *Citronelle Mobil, etc. v. Gulf Oil Corp.*, 591 F.2d 711, 715-16 (Temp.Emer.Ct.App.), *cert. denied*, 444 U.S. 879 (1979). The contract for the sale of propane fixed the price as the "highest permissible by federal or other regulations." To determine whether the prices charged Hidrogas were not above the maximum price MGPC could charge under the federal regulations, the trial court's task was to interpret the regulations.

The trial court recognized that the case depended on interpretation of the regulations. It erred, however, in includ-

ing interpretation of the regulations in the parties' burden of proof. Such interpretation is a matter of law to be decided by the Court. *See Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1066 (Temp.Emer.Ct.App. 1978); *U.S. v. 320.0 Acres of Land More or Less, etc.*, 605 F.2d 762, 818-819 (5th Cir. 1979). The trial court had a duty to decide which of the interpretations advanced by the parties was correct or to apply its own interpretation. The court was entitled to consider the arguments offered by the parties, but it could not treat the meaning of the regulations as a question of fact to be proved by them.

Since the trial court has not interpreted the regulations relevant to deciding the maximum lawful price, this case will be remanded. On remand, the trial court must first interpret the relevant terms and concepts used in Subparts E and K of 10 C.F.R. § 212 and Ruling 1975-6 in addition to any other regulations or rulings the court finds applicable. These regulations and rulings should be interpreted in order to determine how the following factors, and any others the court deems relevant, are to be used in fixing the maximum lawful price. The factors include: (1) First sale price; (2) Increased product costs; (3) Increased nonproduct costs; (4) Banked increased costs; (5) Exceptions relief. After interpreting the regulations, the trial court should apply the facts necessary to calculating the lawful price.[3]

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[3]If on remand the trial court encounters difficulty in supplying a formula for fixing the price, it might consider the wisdom of seeking an *amicus* brief from the Department of Energy. *See Dyke v. Gulf Oil Corp.*, 601 F.2d 557, 569 (Temp.Em.Ct.App. 1979) (suggesting *amicus curiae* appearance).

Although the trial court's opinion indicates that the federal pricing regulations are susceptible of interpretation, the court also described the regulations as "ambiguous, multifarious and changing." Opinion at 11 (Record at Vol. 5, 001609). This description suggests that the regulations may not supply a formula for fixing the price. In such cases, a reasonable price is to be substituted. See Cal.Com. Code § 2305 (West 1964);[1] *North Central Airlines v. Continental Oil Co.*, 574 F.2d 582, 592 (D.C.Cir. 1978) (when a price is fixed based on a standard set by an agency and no standard is set, the court should substitute a reasonable price). On remand, the court should first attempt to ascertain the price by interpreting the regulations. If the court finds, however, that the agreed upon standard failed—i.e., that the federal pricing regulations cannot supply a price for propane during the time the contract was in force—the court should determine a reasonable price.

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[1]Section 2305. Open Price Term. (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time of delivery if

(a) Nothing is said as to price; or

(b) The price is left to be agreed by the parties and they fail to agree; or

(c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Supreme Court of the United States

No. A-50

MGPC, Inc.,
Petitioner,

v.

Canadian Hidrogas Resources Ltd., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 12, 1983.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 27th day of July, 1983.